IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1163

ROSS SHADE, Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

On Appeal From The Supreme Court of The State of California

JURISDICTIONAL STATEMENT

ROSS SHADE, For Himself,
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San Francisco, California
94104

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NO.

ROSS SHADE, Appellant

vs.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

On Appeal From The Supreme Court Of
The State Of California

JURISDICTIONAL STATEMENT

This is an appeal from order denying a writ of review of the Supreme Court of California issued on October 30, 1975 and order denying a rehearing of that court issued on November 25, 1975.

OPINON BELOW

This action was brought under Section 1702 of the Public Utilities Code of the State of California before the Public Utilities Commission of that State. The action was in the form of a complaint by Ross Shade and William H. Faisst against the Pacific Telephone and Telegraph Company and asked the Public Utilities Commission to declare Rule 14 "LIMITATION OF DAMAGES" imposed by that commission to be null and void. From Decision No. 84374 of Public Utilities Commission, Ross Shade appealed to the Supreme Court of the State of California as provided by section 1756 of the Public Utilities Code. The order denying writ of review was entered on October 30, 1975 and rehearing was denied November 25, 1975.

GROUNDS FOR JURISDITION

The jurisdiciton of the Supreme Court of the United States to review the order the California Supreme Court is conferred by Title 28, United States Code, Sections 1253 and 2101)b). The appellant believes the following decisions sustain the Jurisdiction of the Supreme Court to review the case on direct appeal: United States v Capital Transit Company, 325 U.S.357, United States v Detroit and Cleveland Navigation Company, 326 U.S. 236; United States v Pierce Auto Freight Lines 327 U.S.515.

Decision No. 84374 of the Public Utilities Commission was dated the 29th of April 1975. Appellant presented his petition for reconsideration of that decision on May 6, 1975. The Public Utilities Commission of the State of California in Decision No. 84621 denied relief on July 1, 1975. Appellant's Petition for writ of review was timely filed on July 31, 1975. Likewise, the appellant's petition for rehearing before the California Supreme Court was timely filed on November 10, 1975.

Notice of appeal was filed with the California Supreme Court on January 13, 1976. One copy of the notice of appeal was sent by first class mail with postage prepaid, addressed to counsel of record, to the California Public Utilities Commission and to Pacific Telephone and Telegraph Company on that same day.

The appellant has questioned the validity of a rule having the effect as if a statute and the authority of the California Public Utilities Commission to impose said rule that is repugnant to the equal protection of the law secured to the appellant by the Fourteenth Amendment to the Constitution of the United States. That rule to be found as Schedule Cal. P.U.C. No. 36-T, 4th Revised Sheet 56, Rule No. 14, "Limitation of Liability" is as follows:

(1) The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct or violations of law.

(2) In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of $10,000.

(3) Except as provided in Sections (1) and (2) of this rule, the liability of the Utility for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility (including exchange, toll, private line, supplemental equipment, directory and all other services) shall in no event exceed an amount equal to the pro rata charges to the customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect, provided, however, that where any mistake, omission, interruption, delay, error or defect in any one service or facility affects or diminishes the value of any other service

said liability shall include such diminution, but in no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omission, interruption, delay, error or defect.

The Pacific Telephone and Telegraph Company has used Rule 14 "Limitation of Damages" as a shield and has refused to consider payment of damages.

Rule 14 "Limitation of Damages" is unclear in that gross negligence is a difficult and questionable concept of law so that even if the telephone companies may wish to comply with the provisions it is unable to do so and must test each case in the courts before payment of damages of the amount provided.

Hearings before the Public Utilities Commission of the State of California are conducted before an examiner and the Commission did not hear the appellant's case and refused to do so by way of a rehearing. The Public Utilities Code of the State of California deprives jurisdiction to any court except the Supreme Court to review, reverse, correct, or annul any order or decision of the Public Utilities Commission or to interfere with the commission's performance of its official duties. (Public Utilities Code, Section 1759) And the Supreme Court of the State of California upheld Section 1759 of the code on July 9, 1974, while appellant's case was pending before the Commission so that there is no question that the appellant may not raise this same question in any other state court in California. (Waters v Pacific Telephone Co. 21 C 3d 1) Because of the above the appellant has not been heard, other than by an examiner, and can not obtain a hearing on the questions raised by his petition in another state court.

The rule of which the appellant complains, the hearing and the denial of petitions for review have denied the appellant his rights under the

equal protection of the law and due process of law secured to him by the Tenth and Fourteenth Amendment of the U.S. Constitution.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California has refused to declare invalid its own rule shielding telephone companies from liability for their own acts of negligence. No court other than the Supreme Court of the State of California may reverse, correct or annul a decision of the Public Utilities Commission. The appellant believes that this immunity unfairly discriminates against the appellant and in favor of the telephone companies on a basis wholly unrelated to the objective of the Public Utilities Code.

The Rule 14 "Limitation of Liability" is so unclear as when the telephone companies may pay damages of ten thousand dollars or a lessor amount, that enforcement of that rule unfairly discriminates against the appellant and in favor of the telephone companies.

Hearings before the examiner appointed by the Public Utilities Commission of the State of California without provision for hearings before the Commission and without a hearing before the State Supreme Court, is repugnant to the due process of law as secured by the Tenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

Because of an error made by employees of the Pacific Telephone and Telegraph Company, the appellent's listing in the classified section of the 1972 directory was omitted from the section of the directory reserved for those engaged in the profession of accounting as certified public accountants. As a result of this omission the appellant was damaged by an amount that he believes exceeds the amount allowable by Rule 14 "Limitation of

Liability".

The nature of the error which resulted in the omission of the appellant's listing was of a type that could and should have been prevented and the appellant believes that it was caused by the gross negligence of the telephone company.

FEDERAL QUESTION RAISED

The appellant's complaint against the Pacific Telephone and Telegraph Company stated that the defendant makes a large number of errors each year and because of the limitation of damages of Rule No. 14 they do not use ordinary care. Appellant asked in that complaint that the rule be revoked. In an amended complaint the appellant asked the Commission to increase the amount which might be recovered.

After the hearing before the examiner appointed by the Commission final briefs were submitted, by the appellant on January 10, 1974 and by The Pacific Telephone and Telegraph Company on January 30, 1974. In the appellant's answer to Pacific's brief, filed February 11, 1974, the appellant again argured that the limitation of liability was not reasonable. On July 9, 1974, while the appellant's case was under submission, the Supreme Court of the State of California, in the case of Waters vs Pacific Telephone Company,* on appeal from a decision in favor of Waters in the California Court of Appeal, held that no court other than the Supreme Court of California could review, reverse, correct, or annul any order or decision of the Public Utilities Commission. This decision in the Waters case would preclude the appellant's future action in connection with his civil action. For this reason the appellant petitioned the California Public Utilities Commission to consider additional arguments having as their basis the appellant's consitutional rights.

The equal protection of the law and the due

* (Waters v Pacific Telephone Co. 21 C3d 1)

process provisions of the Tenth and the Fourteenth Amendments of the Constitution of the United States have been included in all petitions that have been filed subsequent to July 9, 1974.

FEDERAL QUESTIONS ARE SUBSTANTIAL

Modern business enterprise has no alternative to the telephone and depends on the classified section of the telephone directory. Omission from the "yellow pages" can cause substantial damage to the business or professional person. In those few instances where limited liability is provided in contracts, the existance of an alternative is the key. Thus were an individual seeking services of a company that is shielded from liability by statute or regulation, he is in all other cases provided with clear alternatives. In no cases has the shield of limited liability extended to include those cases where gross negligence of the protected party exists.

No public utility has affected the business and professions more than the telephone. Limitation of liability continues to exist in some states and yet that limitation was reasonable only in those early years before it became as essential as it is to the business community of today. The importance of the telephone can be seen by the fact that the American Telephone & Telegraph Company is today one of the largest corporation in the world.

ARGUMENT

The issues involved in this appeal are similar to those raised by Western Union Telegraph Co. v Czizek, 264 U.S. 281 and Western Union Telegraph Co. v Priester, 276 U.S. 252. However, gross negligence was absent in these cases and the customer had an alternative where, by payment of an additional amount, he could be assured that the message was sent and received correctly. The issues in

this case also find their equivalent in American Railway Express Co. v Daniel 269 U.S. 40 and in Southeastern Express Co. v Pastime Amusement Co. 299 U.S. 28. In these cases the customer could have obtained protection by paying a higher rate.

The "American Rule" involving persons being transported by airliner has always permitted recovery of damages even when risk was substantial. 8 Am Jur. 2d, page 707 at #85. Where liability has been limited, as under the Warsaw Convention, the customer has an alternative. Ross v Pan American Airlines, 299 NY 88. Unlike these cases, the person requesting telephone service can not obtain insurance that would cover the possibility of negligence by the employees of the telephone company.

The question of limited liability has been resolved in favor of the injured party in state courts. In California the Supreme Court held in Brown v Merlo,(106 Cal Rpter 388; 506 Pac 2d 212) that the so called "guest statutes" were invalid under the equal protection of law provisions of the California and U.S. Constitutions.

The same question of limited liability was resolved in favor of the injured parties in cases where statute otherwise would have shielded hospitals rendering service for free. Silva v Providence Hospital, 14 Cal 2d 762; Malloy v Fong, 37 Cal 2d 356.

The California courts have seen fit to end the immunity from liability as it pertained to local governmental agencies. Muskopf v Corning Hospital Dist. 55 Cal 2d 211. The Illinois courts reached a similar conclusion in Harrey v Clyde Park Dist. 32 I11 2d 60. Even in cases of voluntary acts such as the giving of blood, a contract which limited the liability of one party was considered invalid. Ball v Sharp & Dohme Inc. 121 N.Y.S.2d 20.

Statutes that discriminate against a class of persons on the basis of criteria wholly unrelated to the objective of the statute have been declared by this Court in innumerable cases a few of

which are: Reed v Reed 404 U.S. 71; Eisenstadt v Baird 405 U.S. 438; Weber v Aetna Casualty & Surety Co 406 U.S. 164; Rinaldi v Yeager 384 U.S. 305 James v Strange 407 U.S. 128. The rule that limits the liability of The Pacific Telephone and Telegraph Company, discriminates against the entire business community that may be damaged by the negligence of that utility. By reason of this immunity, the telephone company has no incentive to use even slight care to prevent errors in their directories and do irrevocable harm to hundreds of persons each year. Persons advertising in the classified section of the telephone directories would not be subjected to substanially higher rates if that utility did not have this immunity as the means exist that would enable the telephone company to prevent errors.

The Rule 14 "Limitation of Liability" has provided telephone company with immunity that is not reasonable from the standpoint that this rule or tariff is uncertain. Section (1) provides that the rule does not apply to errors and omissions caused by willful misconduct, fraudeulent conduct or violation of law. Section 451 of the Public Utilities Code provides that "Every public utility shall furnish and maintain such adequate, efficient just and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees and the public." Also, Section 453 provides that "No public utility shall as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage." Also Section 2106 of the Code provides any person or corporation may recover from the utility for all loss, damages, or injury caused by the utility and "An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any

corporation or person." Rule 14, Limitation of Liability, when considered together with the above provisions of the Code, becomes uncertain in-as-much-as, failure of the telephone company to provide a means by which each person is assured of a proper listing would be a violation of Sections 451 or 453. If gross negligence is present there should be no question but that there has been a violation of section 451.

The definition of gross negligence is not clear in the law so that even if the utility wanted to pay compensation to an injured customer up to the limit, it could not comply. Section 2106 of the Code, on one hand gives the injured party the right to recover damages. But Section (2) of Rule 14, denies the appellee these same rights. Section 2106 even provides for exemplary damges but the Commission has denied the appellant the right to obtain even reasonable compensation for his loss of income and provides nothing for the cost of litigation.

Cases involving the liability of telephone companies are in conflict in the various state courts. There is much support for the limitation of liability from cases decided in the years before the classified section of the directory and the telephone service became so essential to the business community. In the absence of an allegation of gross negligence the New York court held that the limitation of liability rule was a reasonable rule. Hamilton Employment Service v N.Y. Telephone Co. (1930) 253 N.Y. 468. In Illinois however, the court found that exemption from the consequences of their own gross negligence by contract is against public policy. Tyler v Western Union Telegraph Co. 60 Ill 421. In Wisconsin the court allowed the injured party to recover damages. Wm H. Schwanke Inc. v Wisconsin Telephone Co., 199 Wis. 552, 68 ALR 1320.

Circumstances have changed and today public policy demands that limitation of liability be

abolished in cases where the parties have unequal bargaining positions such as the customer dealing with a public utility. Public policy is well documented in cases involving other than the telephone companies and is also set out at section # 575 of the Restatement of Contracts.

CONCLUSION

The appellant believes that the Public Utilities Commission of the State of California and the Supreme Court of that State have failed to recognize, the changes in public policy, changes in the use of the telephone and the substantial authority that exists which require termination of the rule that limits the liability of telephone companies.

Respectfully submitted,

ROSS SHADE

ROSS SHADE

ORDER DENYING WRIT OF REVIEW

S. F. No. 23326

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SHADE, ETC., Petitioner,

v.

PUBLIC UTILITIES COMMISSION, ETC., ET AL., Respondents;

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Real Parties in Interest.

Sullivan, J., did not participate.

SUPREME COURT

FILED

OCT 30 1975

C. E. Watts, Clerk

Deputy

Petition for writ of review DENIED.

Wright

Chief Justice

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 25 1975

I have this day filed Order

REHEARING DENIED

In re: SF No. 23326
Shade-

vs.
FHC

Respectfully,

G. E. BISHEL
Clerk

85365-877 7-75 3M OSP

S. F. NO. 23326

IN THE SUPREME COURT OF THE STATE

OF CALIFORNIA

ROSS SHADE, for himself, Complainant, Petitioner, vs. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, D.W. HOLMES, WILLIAM SYMONS, JR., VERNON L. STURGEON, ROBERT BATINOVICH, LEONARD ROSS, and the members of and constituting said Public Utilities Commission, Respondents, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Real Party in Interest.	NO. 23326 SUPREME COURT FILED JAN 13 1976 G. E. BISHEL, Clerk Deputy

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ross Shade, the appellant above-named, here-by appeals to the Supreme Court of the United States from order denying writ of review, entered on October 30, 1975 with rehearing denied on November 25, 1975.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

ROSS SHADE

Ross Shade

AFFIDIVIT OF SERVICE

I hereby certify that I have this date served the foregoing jurisdicational statement upon all interested parties in this proceeding as shown below, addressed to each and including three copies, sent by first class mail, postage prepaid.

Signed under penalty of perjury this 14th day of February, 1976 at San Francisco, California.

ROSS SHADE

Ross Shade

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1163

ROSS SHADE,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

JAMES A. DEBOIS
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140 New Montgomery Street
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Attorneys for The Pacific Telephone and Telegraph Company, real party in interest, as appellee.

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1163

ROSS SHADE,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of of the State of California

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Motion to Dismiss or Affirm

The Pacific Telephone and Telegraph Company (hereinafter called "Pacific Telephone"), appearing herein as an appellee,[1] moves the Court to dismiss the appeal herein for

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1. This corporation is the real party in interest against which appellant's attack upon the Public Utilities Commission of California is directed. It was a party to the proceedings before the Public Utilities Commission and participated therein. The challenged order of the Commission directly affects the service offerings of this company and the rates charged by it. Under California law it was entitled to appear and did appear in the proceedings

want of jurisdiction, or in the alternative to affirm the judgment, on the following grounds:

1. The appeal does not present a substantial Federal question.

2. The asserted "due process" and "equal protection" questions are not properly before this Court as not having been raised or passed upon by the court (here the Commission) below.

3. The judgment below is clearly correct under principles well settled by this Court.

OPINIONS BELOW

The Supreme Court of California on October 30, 1975, without decision or comment, denied appellant's Petition for Writ of Review (Jur. St., Appx. A)[2] of Decision No. 84374 of the California Public Utilities Commission (hereinafter called "the Commission") rendered on April 29, 1975, and Decision No. 84621 rendered on July 1, 1975, denying appellant's Petition for Reconsideration of Decision No. 84374. The decisions of the Commission are not yet officially reported.[3]

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before the Supreme Court of California as real party in interest (Cal.Pub.Util.Code § 1758, which provides in pertinent part:

> "The commission and each party to the action or proceeding before the commission may appear in the review proceeding.")

Having this status, it is the party in interest here and has standing to move to dismiss the appeal for want of jurisdiction. See *Los Angeles v. Pub.Util.Comm'n* (1959) 359 U.S. 119 (per curiam).

2. References herein to appendices are to those appended to the jurisdictional statement. "Jur.St." followed by a page number refers to pages of the text of the jurisdictional statement.

3. Copies of the decisions of the Commission are not appended to the jurisdictional statement as required by Rule 15(h). Copies of such decisions are attached hereto as Appendices 1 and 2.

JURISDICTION

Appellant's petition for rehearing of the Supreme Court's Order denying Writ of Review was denied on November 25, 1975 (Appx. B). A notice of appeal was filed on January 13, 1976 (Appx. C).

Jurisdiction is asserted by appellant under Title 28, United States Code § 1257(2).

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED

In spite of his tortured presentation of the questions involved on this appeal (Jur. St., pp. 2-5), appellant is apparently challenging the reasonableness of Pacific Telephone's limitation of liability tariff (Rule 14), and the denial of "equal protection of the law and due process of law secured to him by the Tenth [sic] and Fourteenth Amendments of the U.S. Constitution" in proceedings before the Commission and before the California Supreme Court.

Jurisdiction is hereby challenged on the grounds that no one of these contentions presents a substantial Federal question and that the constitutionality of the Rule and the procedures was not raised in or passed upon by the Court below (here the Commission) and thus is not properly before this Court.

STATEMENT OF THE CASE

The facts underlying the complaint can be very simply stated. On June 21, 1972, appellant ordered telephone service and certain directory listings to appear in the alphabetical and classified sections of the September, 1972, San Francisco directory. The listings requested were for the firm name Shade, Faisst & Co., and the individual partners, Ross Shade and William Faisst. Said listings were accepted and printed in the alphabetical section of the directory as well

as in Pacific Telephone's directory assistance records. A listing for the firm name was accepted for the classified section of the directory under the classified heading, "Accountants - Certified Public". This listing was published erroneously under the heading, "Accountants - Public". The last date for the acceptance of the above-mentioned listings was June 28, 1972.

Listings for the individual partners could not be accepted in the classified section of the directory because such listings are items of advertising, and the last date for the acceptance of items of advertising for the September, 1972 San Francisco directory was June 8, 1972.

As a result of its error in publishing the firm name under the classified heading of "Accountants - Public" rather than "Accountants - Certified Public", Pacific Telephone, in accordance with the provisions of its limitation of liability rules, offered to adjust 100% of the basic monthly charges ($35.20 per month plus tax) for appellant's telephone service during the life of the directory including the charges for the individual listings correctly published in the alphabetical section of the directory. Appellant rejected this offer and commenced his action before the Commission. At the same time, appellant commenced a parallel civil action (*Shade et al. v. The Pacific Tel. & Tel. Co.*, Civil No. 664-027 Superior Court, San Francisco, California, filed August 10, 1973) seeking damages for alleged willful misconduct, violation of law and/or gross negligence, which action is still pending.

Hearings were held on December 17 and 18, 1973, and final briefs were submitted on February 14, 1974. On April 29, 1975, the Commission rendered Decision No. 84374 which denied the relief sought by appellant except that it

ordered Pacific Telephone to make the adjustment previously offered which, with interest, totaled $537.46.

On May 9, 1975, appellant sought reconsideration of Decision No. 84374. On July 1, 1975, in Decision No. 84621, the Commission modified its original decision by the inclusion of an additional finding of fact, and denied any further relief. On July 25, 1975, appellant sought reconsideration of Decision No. 84621 as to the additional findings of facts. Further reconsideration of said decision was denied by the Commission by Decision No. 84878 rendered September 3, 1975.

ARGUMENT

I

Appellant's Argument That Pacific Telephone's Limitation of Liability Rules Are Unreasonable and Discriminatory Presents No Substantial Federal Question.

The reasonableness of Pacific Telephone's limitation of liability rules (Rule 14 attached to Appendix 1) has been upheld by the California Supreme Court. Similar limitations have been found reasonable by this Court, the Federal Courts, and other state Courts. In any event, no evidence was presented to impel the Commission to change the rules dealing with the liability of telephone corporations (Appendix 1, p. 6). Furthermore, such issue does not raise a substantial federal question.

California telephone utilities have had tariffs limiting their liability for many years. In 1967, the Commission initiated an investigation into those tariff provisions and after statewide hearings over a period of several years, issued Decision No. 77406 (71 Cal.P.U.C. 229) on June 30, 1970, adopting the tariff provisions which are the subject of this action. The reasonableness of the rules was chal-

lenged before the California Supreme Court in *Waters v. Pacific Telephone Company* (1974) 12 Cal.3d 1 (cited by appellant as 21 Cal.3d 1) 523 P.2d 1161. The court stated at p. 6, n. 5:

> "Both this court and the United States Supreme Court have acknowledged that considerations of public policy which might be applicable to disputes between private parties (see e.g. Civ. Code, § 1668) 'are not "necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body."' (*E. B. Ackerman Importing Co. v. City of Los Angeles*, 61 Cal.2d 595, 599 [39 Cal.Rptr. 726, 394 P.2d 566], quoting from *S.W. Sugar Co. v. River Terminals*, 360 U.S. 411, 417 [3 L.Ed.2d 1334, 1340-1341, 79 S.Ct. 1270].)"

The court went on to say at p. 10:

> "Yet, as we have pointed out (fn. 5, ante), general principles which might govern disputes between private parties are not necessarily applicable to disputes with regulated uitlities. Pacific's use of a credit allowance provision as a means of limiting its liability for ordinary negligence has been considered and approved by the commission, and taken into account in setting its rates. Were the courts permitted to reappraise and reinterpret the language of commission-approved tariff schedules in the guise of 'judicial construction', the supervisory and regulatory functions of the commission set forth above could easily be undermined."

Over 50 years ago, and many times since, this Court has sustained limitation of liability tariffs applying to telegraph messages (*Western Union Telegraph Company v. Esteve Brothers & Company*, (1921) 256 U.S. 566). As recently as 1971, certiorari was denied in a Minnesota case citing the *Esteve Brothers* case and denying liability for more than the tariffed amount in a claim for damages for a delayed

telegraph message (*Komatz Construction, Inc. v. Western Union Telegraph*, (1971) 290 Minn. 129; 186 N.W.2d 691, cert. denied 404 U.S. 856). The *Esteve Brothers* case has been cited and followed in several federal and state cases involving ommissions from telephone directories, all of which upheld the validity of the limitation of liability provisions in filed tariffs (*Georges v. Pacific Telephone and Telegraph Company*, 184 F.Supp. 571 (D. Ore. 1960); *Russell v. Southwestern Bell Telephone Company*, 130 F.Supp. 130 (E.D. Tex. 1955); *Robinson Insurance & Real Estate, Inc. v. Southwestern Bell Telephone Company*, 366 F.Supp. 307 (W.D. Ark. 1973); *Wheeler Stuckey, Inc. v. Southwestern Bell Telephone Company*, 279 F.Supp. 712 (W.D. Okla. 1967); *McTighe v. New England Telephone and Telegraph Company*, 216 F.2d 26 (2d Cir. 1954)). *Robinson, supra*, at 311 cites some 14 states in which simiiar limitations have been upheld either by the state court or by the federal court. The case of *Western Union Telegraph Company v. Priester*, (1928) 276 U.S. 252, cited by appellant (Jur. St., p. 7) in his argument, was cited in *McTighe, supra* at 29 with the *Esteve Brothers* case, *supra* as upholding the validity of limitation of liability provisions in the tariffs of both telephone and telegraph companies. Appellant's arguments that Rule 14 "discriminates against the entire business community" (Jur. St., p. 9), provides the "telephone company with immunity that is not reasonable" (Jur. St., p. 9) and is "wholly unrelated to the objective of the Public Utilities Code" (Jur. St., p. 5) are all answered in the cases cited above which hold that limitation of liability rules are constitutional and legally permissible.

A lengthy annotation in 92 A.L.R.2d 917 enumerates cases in some 18 jurisdictions upholding limitation of liability rules applying to errors in telephone directories. This an-

notation concludes "Either the outright validity and reasonableness of such provisions or their invulnerability to attack in ordinary actions before the courts are very nearly universally established" (p. 921).

The right of a telephone utility to include limitation of liability provisions either in its contracts or in its filed tariffs is settled by the *Esteve Brothers* and *Waters* cases. Appellant's argument to the contrary raises no substantial federal question.

II

Appellant's Arguments That the Limitation of Liability Rules Violate the Equal Protection of the Laws and Due Process Clauses of the Constitution Are Insubstantial and Are Not Properly Before the Court.

Appellant's contention that Pacific Telephone's limitation of liability rules are "repugnant to the equal protection of the law secured to the appellant by the Fourteenth Amendment to the Constitution of the United States" (Jur. St., p. 3) was not made in appellant's complaint to the Commission or in his briefs filed after hearing, but for the first time in his Petition for Writ of Review to the California Supreme Court. It has been held that the judgment of the trial court is that of the highest court of the state for the purpose of a writ of error from the Federal Supreme Court where the highest state tribunal has denied a writ of error to the trial court (*Western Union Telegraph Company v. Crovo,* (1911) 220 U.S. 362). Here the California Supreme Court denied a writ of review without comment or decision. As the federal question was neither raised in nor considered by the Commission in its decision, the contention is not within the jurisdiction of this court (Rule 15, Para. 1(d); Rule 16, Para. 1(b)).

Hearings on appellant's complaint before the Commission were completed on December 18, 1973. Appellant's closing brief was filed on February 11, 1974. In his jurisdictional statement, appellant states "The equal protection of the law and the due process provisions of the Tenth and Fourteenth Amendments of the Constitution of the United States have been included in all petitions that have been filed subsequent to July 9, 1974" (Jur. St., p. 7). On September 12, 1974, some seven months after the date specified for filing of closing briefs, appellant filed with the Commission a document entitled "Petition for Consideration of Additional Arguments Pending a Decision by the Commission". That document for the first time contained two brief references to the Constitution of the United States. The Commission's Decision No. 84374 neither considered nor passed upon any federal questions. It has been consistently held since 1819 that unless it appears on the record that a federal question was raised, preserved or passed upon in the state court below, this court's appellate jurisdiction fails (*Cardinale v. Louisiana,* (1969) 394 U.S. 437, 438-439).

III

Appellant's Argument That He Was Deprived of Due Process Because of a Hearing Before An Examiner and Not Before the Commission Is Equally Insubstantial.

Appellant argues that hearings before the Examiner without provisions for hearings before the Commission and without a hearing before the State Supreme Court "* * * is repugnant to the due process of law as secured by the Tenth Amendment to the Constitution of the United States" (Jur. St., p. 5). We fail to see how the Tenth Amendment, which reserves to the states rights not delegated to the United

States by the Constitution, is apropos here. In any event, this contention is without merit. Though the general rule is that the one who decides must hear, both this Court and the California Supreme Court have held that the requirement of a hearing may be satisfied even though the members of the Commission do not actually hear or even read all the evidence. The obligation of the Commission members is to achieve a substantial understanding of the record by any reasonable means, including the use of an Examiner's summary (*Morgan v. United States,* (1936) 298 U.S. 468, 481; *Allied Compensation Insurance Company v. Industrial Accident Commission,* (1961) 57 Cal.2d 115, 119; 367 P.2d 409; 2 Davis, *Administrative Law Treatise,* §§ 11.02-11.04, pp. 38-57).

CONCLUSION

Since none of appellant's contentions, whether timely or properly raised in the court below or in this Court or not, presents a substantial federal question, none is within the jurisdiction of this Court. In any event, the judgment below is clearly correct under principles well settled by decisions of this Court. We respectfully submit that the appeal should be dismissed or, alternatively, the judgment should be affirmed.

Dated at San Francisco, California, March 16, 1976.

JAMES A. DEBOIS
ROBERT E. MICHALSKI
140 New Montgomery Street
San Francisco, California 94105

Attorneys for The Pacific Telephone and Telegraph Company, real party in interest, as appellee.

Appendix 1

Decision No. 84374

Before the Public Utilities Commission
of the State of California

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership, Complainants, vs. The Pacific Telephone and Telegraph Company, Defendants.	Case No. 9598

(Filed August 10, 1973;
amended October 23, 1973)

Ross Shade and *William H. Faisst,* for themselves, complainants.

Richard Siegfried, Attorney at Law, for The Pacific Telephone and Telegraph Company, defendant.

OPINION

This is a complaint by Ross Shade (Shade) and William H. Faisst (Faisst) against The Pacific Telephone and Telegraph Company (PT&T). The complaint relates to the limitation of liability provisions in PT&T's tariff and its practices thereunder.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis on December 17 and 18, 1973. It was submitted, after the filing of briefs and transcript, on February 14, 1974. On September 16, 1974, complainants filed a petition to set aside submission[1] seeking to

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1. Complainants entitled the document "Petition For Consideration of Additional Arguments Pending a Decision By the Commission."

submit additional arguments. The Commission has carefully considered the matters raised in the petition and finds that it should be denied.

The facts in this matter are not seriously in dispute.

Findings of Fact

1. Shade and Faisst are certified public accountants. Shade has practiced his profession in San Francisco for 12 years.

2. Commencing January 1, 1971, Shade was associated with Joseph Harb, another CPA. They conducted their business under the name of Harb, Shade & Company. By March of 1972 another associate had been added and the business was conducted under the name of Harb, Shade & Ring. In March, 1972, Harb and Shade agreed to discontinue their partnership as soon as Shade could find appropriate office space at another location.

3. On or about June 1, 1972, Shade discussed the formation of a partnership with Faisst.

4. The closing date for listings in the 1973 San Francisco directory was June 28, 1972. The closing date for advertising was June 8, 1972.

5. It is the practice of PT&T's directory department to change all items of advertising to conform to main listings (white pages) received before the directory closing date.

6. By the middle of June 1972, Shade and Faisst had agreed to form an association and to conduct their business under the name of Shade, Faisst & Company.

7. During June 1972, Shade and Faisst leased office space for their business at 44 Montgomery Street, San Francisco.

8. On June 21, 1972 Shade and Faisst went to PT&T's Bush Street, San Francisco business office. At the business

office Shade first talked by telephone to a PT&T marketing representative who was located in another building. Shade requested a listing under the heading of Accountants - Certified Public for Shade, Faisst & Company and individual listings of the partners names in the yellow pages. The marketing representative informed Shade that PT&T would accept the firm listing which would appear in the yellow and white pages of the 1973 directory, but that the individual listings were considered to be additional advertising and could not be accepted because it was past the closing date for accepting advertising. The marketing representative telephoned the appropriate information to a customer service representative, at the Bush Street office, who prepared a listing agreement form, which Shade signed. The information on the form correctly indicated that Shade, Faisst & Company was to be listed under the yellow page heading of Accountants - Certified Public.

9. The listing for Shade, Faisst & Company was improperly coded by some employee of PT&T to reflect that it should appear under the heading of Accountants - Public. As a result, the listing of Shade, Faisst & Company appeared in the 1973 San Francisco directory under the yellow page heading of Accountants - Public.

10. The failure to list Shade, Faisst & Company under the heading Accountants - Certified Public in the yellow pages of the 1973 San Francisco directory was an error by PT&T. This error diminished usefulness of the listing the one year in which the 1973 San Francisco directory was in use.

11. On April 3, 1972, PT&T accepted an advertising order from Harb, Shade & Ring for three extra lines of

yellow page advertising to provide individual listings for each member of that firm. On June 26, 1972, PT&T received a request from the firm that its listing should be changed to Harb, Levy, Weiland & Ring. PT&T instituted a service order to effectuate the change. On June 30, 1972, the advertising sales department questioned the change because of the lines of information associated with the listing. On July 5, 1972, the firm was contacted by PT&T and advised that the new listing was correct and that the lines of information should reflect the new listing. The 1973 directory yellow pages contained the listing of Harb, Levy, Weiland & Ring, with some corresponding individual listings, under the heading of Certified Public Accountants. No additional individual listings (lines of information) were added.

12. During the years indicated the number of PT&T directory listings, advertising published and errors were as follows:

	1970	*1971*	*1972*
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13. During the years indicated PT&T's telephone directories had the following number of classified listings, advertisements, and errors:

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Total Classified Errors	9,709	9,007	8,858
Number of Listings Under Wrong Heading	401	388	337
Percentage of Errors Under Wrong Heading	.021%	.019%	.017%

14. During the years indicated, PT&T's San Francisco directory had the following number of listings, advertising, and errors:

	1970	*1971*	*1972*	*1973**
White Page Listings	320,649	314,369	312,003	312,170
White Page Errors	482	304	247	168
Percentage of White Page Errors	.150%	.097%	.079%	.054%
Classified Listings and Items of Advertising	126,101	129,569	131,582	134,193
Classified Errors	654	474	543	460
Percentage of Classified Errors	.519%	.366%	.413%	.343%
Total White Page and Classified Listings and Advertising	446,750	443,938	443,585	446,363
Total White Page and Classified Errors	1,136	778	790	628
Percentage of Errors	.254%	.175%	.178%	.141%

*Includes 4th quarter of 1972.

15. Shade, Faisst & Company is entitled to a credit allowance from PT&T in an amount equal to the basic main business exchange rate for a period of twelve months commencing September of 1972. No discrimination will result from the payment of interest on reparations for that amount.

16. Shade, Faisst & Company filed an action in the superior court against PT&T seeking damages in connection with the aforesaid facts. PT&T takes the position in that litigation that there was no gross negligence involved

and has refused to settle the case on a basis other than that of offering complainants a credit allowance.

The material issues in this proceeding are as follows: (1) Should the Commission enter an order changing the rules limiting the liability of telephone corporations? (2) Are complainants entitled to any relief because their firm was listed under the heading Accountants - Public rather than Accountants - Certified Public in the 1973 San Francisco directory? (3) Did PT&T discriminate against complainants by accepting listings and/or items of advertising from other persons after the applicable closing dates for the 1973 San Francisco directory? (4) Are PT&T's practices in connection with the acceptance and transmitting of new listings to its directory department unjust, unreasonable, unproper [sic], inadequate, or insufficient? (5) Did PT&T act in an arbitrary, unjust, or improper manner when it declined to enter into a settlement of the superior court action with complainants on a basis other than that of a credit allowance?

Complainants first contend that the Commission should remove the rules limiting liability of telephone corporations so they can recover in the superior court action damages without limitation against PT&T for the error which is the subject of this complaint. In the *Limitation of Liability* case (1970) 71 CPUC 229, the Commission most recently considered the question of the limitation of liabilities of telephone corporations. After statewide hearings, we held that there was no limitation of liability for tortious conduct, we ordered telephone corporations to adopt tariffs providing for liability in amounts not to exceed $10,000[2] for gross

2. The decision limits liability for gross negligence to $2,000 for telephone corporations having gross revenues of $1,000,000 or less and $10,000 for telephone corporations having gross revenues over $1,000,000.

negligence, and we authorized them to adopt tariff provisions limiting liability for ordinary negligence to specified credit allowances. Complainants' arguments are similar to ones advanced in the *Limitation of Liabilities* case. Complainants *presented no evidence on these issues which would impel us to change the rules dealing with the limitation of liability of telephone corporations.*

Complainants next contend that PT&T acted arbitrarily and improperly by refusing to settle the superior court action filed against it by complainants. There is no merit in this contention. The record indicates that PT&T admits that an error occurred and has offered complainants 100 percent credit allowance for the year in question. PT&T denies that any gross negligence is present under the facts presented. Under the limitation of liability rules, heretofore discussed, *gross negligence is a prerequisite for the maintenance of complainants' superior court action.* Complainants argue that litigants often enter into compromise settlements of lawsuits, even though they believe in the correctness of their position, in order to minimize the cost of litigation. Complainants take the position that PT&T expends more money in defending lawsuits, such as their superior court action, than would be expended if they entered into compromise settlements. They ask the Commission to order PT&T to enter into good faith compromise settlements in such instances, which would benefit PT&T's ratepayers as well as the litigants.

Complainants' contention that the net cost of settling all litigation would be less than the results of prosecuting it is entirely without factual support in this record. Furthermore, mandating such a policy could evoke the filing of numerous nuisance value actions which would inure to the disadvantage of PT&T's ratepayers. Even if it be assumed

that the Commission has jurisdiction to enter the type of order contended for by complainants,[3] the facts in this proceeding do not call for the exercise thereof. Since a superior court action is pending between the parties, we believe it inappropriate to discuss in detail PT&T's refusal to settle that litigation on other than a credit allowance basis.[4] Our examination of the record leads us to find that PT&T did not act improperly, arbitrarily, or unreasonably in refusing to settle the superior court action on a basis other than that of a credit allowance.

The remaining issue to be considered is whether PT&T discriminated against complainants. Public Utilities Code Section 453 provides in part:

3. The Commission has ordered utilities subject to its jurisdiction to prosecute or defend matters cognate and germane to their utility activities. (*PG&E Co.*, etc. (1957) 56 CPUC 66, 67; *PG&E Co.* (1959) 57 CPUC 236, 248; *So. Cal. Gas Co.* (1959) 57 CPUC 250, 259; *So. Cal. Gas Co.* (1959) 57 CPUC 262, 270-71.) If a utility were to engage in a calculated course of unnecessary litigation, the Commission could disallow the expenses thereof in an appropriate rate proceeding. (*Pacific Tel. & Tel. Co. v Public Utilities Commission* (1965) 62 C 2d 634, 659, 668-70.) We express no opinion on the question of whether the Commission could, consonant with due process, order a utility subject to its jurisdiction to compromise its claim or not assert a defense which it in good faith believes to be applicable in a superior court action involving a matter (e.g. awarding damages for gross negligence) over which the Commission has no jurisdiction. We are not here considering situations in which there have been prior Commission orders or factual determinations or in which the Commission has paramount jurisdiction. (*Pacific Tel. & Tel. Co. v Superior Court* (1963) 60 C 2d 426, 430; *Miller v Railroad Commission* (1937) 9 C 2d 190, 195, 197-98; *R. E. Tharp, Inc. v. Miller Hay Co.* (1968) 261 CA 2d 81; *People ex rel Public Utilities Commission v Ryerson* (1966) 241 CA 2d 115; *Pratt v Coast Trucking, Inc.* (1964) 228 CA 2d 139.)

4. In order to award a credit allowance (reparations) it is only necessary to determine that a mistake, error or omission, etc. occurred. (71 CPUC 229, 251 *et seq.*) The Commission does not award damages for gross negligence. (*Waters v Pacific Telephone Company* (1974) 12 C 3d 1, 8-9.)

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

Complainants base their charge of discrimination on the fact that PT&T changed the lines of information listings for Harb, Levy, Weiland & Ring after June 8, 1972 but would not sell Shade, Faisst & Company lines of information after that date.

The Commission finds that no discrimination occurred under the facts herein presented. "Whenever a line must be drawn, there is little that separates the cases closest to it on either side." (*Wood v Public Utilities Commission* (1971) 4 C 3d 288, 296; appeal dismissed for want of substantial federal question 404 U.S. 931.) Common sense indicates that if PT&T is to publish and distribute directories annually, deadlines must be established. The establishment of an earlier deadline for advertising (including informational listings) than for regular listings does not appear to be unreasonable. Since there is also a deadline for listings, the practice of changing advertising to conform to listings is also not unreasonable. There is a difference in making changes within directory advertising space already allocated and adding additional content requiring more space. As indicated, PT&T accepted an advertising order on April 3, 1972 for lines of information for the then firm of Harb, Shade & Ring. This was before the June 8, 1972 cutoff date for acceptance of advertising. On June 26, 1972, the firm changed its main listing and asked that the lines of information reflect the new listing. No additional lines of information were added. The June 26th request was before the June 28, 1972 cutoff date. Under these facts, no discrimination occurred.

No other points require discussion. The Commission makes the following additional findings and conclusions.

Findings of Fact

17. There is no evidence in this record which would require the Commission to change the rules dealing with the liability of telephone corporations as set forth in the *Limitation of Liability* case 71 CPUC 229.

18. PT&T did not act improperly, arbitrarily, or unreasonably in refusing to settle the superior court action which complainants brought against it on a basis other than that of a credit allowance.

19. PT&T did not discriminate against complainants when it refused to accept advertising (lines of information) on June 21, 1972, for publication in PT&T's 1973 San Francisco directory.

Conclusions of Law

1. PT&T should be ordered to grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate for the period of one year commencing September 1972, with interest at the rate of 7 percent per annum from September 1973 to the payment or crediting thereof.

2. Complainants are entitled to no other relief in this proceeding.

ORDER

IT IS ORDERED that The Pacific Telephone and Telegraph Company shall grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate charged Shade, Faisst & Company for the period of one year commencing September, 1972. The credit allowance shall bear interest at the rate of 7 percent per annum from September 1973 to the date of payment thereof

(if paid in cash) or the date credited against accrued outstanding charges.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of April, 1975.

Vernon L. Sturgeon
President
William Symons, Jr.
D. W. Holmes
Leonard Ross
Robert Batinovich
Commissioners

Appendix 2

Decision No. 84621

Before the Public Utilities Commission
of the State of California

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership, Complainants, vs. The Pacific Telephone and Telegraph Company, Defendants.	Case No. 9598

(Filed August 10, 1973;
Amended October 23, 1973)

ORDER DENYING RELIEF

On May 9, 1975, complainants, Ross Shade and William H. Faisst filed a "Petition for Reconsideration and to Amend Decision No. 84374". Attached to this filing is a document entitled "Petition Requesting the Public Utilities Commission to Withdraw Decision No. 84374 Forthwith".

We have considered fully the assertions and arguments presented and, except for the discussion immediately following, are of the opinion that good cause for relief has not been made to appear.

In Decision No. 84374 we specifically recognized that The Pacific Telephone and Telegraph Company's (PT&T) practices in connection with the acceptance and transmission of new listings to its directory department were a material issue. After reviewing the instant filing and the record herein, we are of the opinion that PT&T's practices in this regard are not unjust, unreasonable, improper, inadequate or insufficient.

PT&T's procedures were fully described at the hearings. Exhibit No. 14 is a flow chart which shows the carefully drawn steps developed to handle new listings. A minor change did occur in new listing procedures between 1972 and the present. However, we are unable to find fault with either the past or present procedures.

In the instant filing, petitioners specifically refer to (1) information given them regarding cut-off dates for listings and (2) the preparation and use of "contract memoranda" and "listing agreement forms" by PT&T. We cannot, based on the record established, find that these matters evidence a shortcoming in PT&T's procedures.

THEREFORE, IT IS ORDERED that:

1. Decision No. 84374 is hereby modified by the inclusion therein of the following findings of fact:

> "20. PT&T's practices in connection with the acceptance and transmitting of new listings in its directory department have not been shown to be unjust, unreasonable, improper, inadequate or insufficient."

2. Further relief with respect to Decision No. 84374, as modified hereinabove, is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 1st day of ....., 1975.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturgeon
Robert Batinovich
Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1163

ROSS SHADE,

Appellant,

VS.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Supreme Court of the State of California

Motion to Dismiss or Affirm

RICHARD D. GRAVELLE
J. CALVIN SIMPSON
JOHN S. FICK
5072 State Building
San Francisco, California 94102
Attorneys for the Public Utilities Commission of the State of California

Dated: March 18, 1976

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

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OCTOBER TERM, 1975

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ROSS SHADE,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California

Motion to Dismiss or Affirm

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of California on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

THE TARIFF PROVISIONS INVOLVED AND THE NATURE OF THE CASE

A. The Tariff Provisions

This appeal challenges the validity of tariff provisions of The Pacific Telephone and Telegraph Company (PT&T)

on file with Appellee. These provisions, contained in Tariff Schedule No. 36-T, are set out by Appellant in his Jurisdictional Statement (Juris. St., 3).

Generally, these provisions provide that damages arising out of mistakes or errors by PT&T shall be limited to an amount equal to the pro rata charges to the customer for the period during which the service or facilities was affected by the mistakes or errors. Liability of PT&T for errors caused by gross negligence is limited at $10,000. The limitation provisions do not apply to errors caused by willful misconduct, fraudulent conduct or violations of law.

B. The Proceedings Below

The subject tariff provisions were established by Appellee in 1970 after investigation and hearing *(Limitation of Liability* (1970) 71 Cal. P.U.C. 229). In 1973, Appellant, together with William H. Faisst, filed a complaint before Appellee seeking, among other things, an order changing PT&T's limitation of liability rules. After hearing Appellee issued its Decision No. 84274 on April 29, 1975 declining to order a change in the contested rules.[1] A further order denying relief was issued by Appellee in Decision No. 84621, dated July 1, 1975.[2] Decisions Nos. 84374 and 84621 are not yet reported.

No opinion was rendered by the California Supreme Court. Instead, an order denying a petition for writ of review was issued October 30, 1975. On November 25, 1975, the California Supreme Court denied rehearing.[3]

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1. Decision No. 84374 is attached hereto as Appendix A to this motion.

2. Decision No. 84621 is attached hereto as Appendix B to this motion.

3. The orders of the California Supreme Court are attached to Appellant's Jurisdictional Statement.

II

ARGUMENT

The Case Presents No Substantial Question

Appellant urges that he has been denied rights to equal protection and due process as secured to him by the United States Constitution (Juris. St. 4-5). Specifically, Appellant claims that (1) the subject limitation of liability provisions constitute unfair discrimination and (2) he was denied procedural due process because his complaint was heard by a hearing examiner and not heard by the Commissioners of Appellee or the California Supreme Court.[4]

Rules limiting liability have, for some time, been upheld when, as here, they are subject to regulatory authority. (See *Southwestern S & M Co. v. River Term. Corp.* (1959) 360 U.S. 411, 3 L.ed.2d 1334; *Western Union Teleg. Co. v. Esteve Brothers & Co.* (1921) 256 U.S. 566, 65 L.ed. 1094; *Waters v. Pacific Telephone Corp.* (1974) 12 C.3d 1, 523 P.2d 1161, 114 Cal. Rptr. 753.) Appellant cites no authority to the contrary. Indeed, in many of the cases relied on by Appellant rules limiting liability were given effect (e.g., *Western Union Teleg. Co. v. Czizek* (1924) 264 U.S. 281, 68 L.ed. 682 and *Western Union Teleg. Co. v. Priester* (1928) 276 U.S. 252, 72 L.ed. 555 cited by Appellant in his Jurisdictional Statement at 7).

Appellant claims that the tariff provision, limiting liability for acts of gross negligence at $10,000, is invalid in that the term gross negligence is unclear (Juris. St., 10). Thus it is urged that gross negligence is a questionable concept of law (Juris. St., 4). This is not so. As pointed

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4. Appellant presents no argument at all with respect to the second contention. Instead, Appellant's argument is devoted entirely to the issue of the reasonableness of the limitation of liability provisions.

out in Appellee's decision establishing the subject tariff provision, the California courts and Legislature have used the standard of gross negligence without difficulty in many contexts. (See *Limitation of Liability, supra,* 71 Cal. P.U.C. at 232-233.) Appellant has failed totally to show that the use of gross negligence as a standard of conduct is constitutionally infirm. There is absolutely no authority cited by Appellant in support of this claim.

As indicated above, Appellant contends, without argument, that hearings before hearing examiner are repugnant to the due process of law as guaranteed by the Constitution (Juris. St., 5). To the contrary, the law at both state and federal levels does not require deciding officers to hear the evidence (*Allied Compensation Ins. Co. v. Industrial Accident Commission* (1962) 57 C. 2d 115, 367 P. 2d 409, 17 Cal. Rptr. 817; 2 Davis, Administrative Law Treatise (1958) 11.01 *et seq.*).

III

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the California Supreme Court.

Respectfully submitted,

/s/ Richard D. Gravelle
Richard D. Gravelle

/s/ J. Calvin Simpson
J. Calvin Simpson

/s/ John S. Fick
John S. Fick

5072 State Building
San Francisco, California 94102
Attorneys for the Public Utilities Commission of the State of California

Dated: March 18, 1976

(Appendices Follow)

Appendix A

Decision No. 84374

Before the Public Utilities Commission of the State of California

Case No. 9598
(Filed August 10, 1973;
amended October 23, 1973)

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership. Complainants, vs. The Pacific Telephone and Telegraph Company, Defendants.	)

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OPINION

This is a complaint by Ross Shade (Shade) and William H. Faisst (Faisst) against The Pacific Telephone and Telegraph Company (PT&T). The complaint relates to the limitation of liability provisions in PT&T's tariff and its practices thereunder.

A duly noticed public hearing was held in this matter before Examiner Donald B. Jarvis on December 17 and 18, 1973. It was submitted, after the filing of briefs and transcript, on February 14, 1974. On September 16, 1974, complainants filed a petition to set aside submission[1] seek-

1. Complainants entitled to document "Petition For Consideration of Additional Arguments Pending a Decision By the Commission."

ing to submit additional arguments. The Commission has carefully considered the matters raised in the petition and finds that it should be denied.

The facts in this matter are not seriously in dispute.

Findings of Fact

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14. During the years indicated, PT&T's San Francisco directory had the following number of listings, advertising, and errors:

	1970	1971	1972	1973*
White Page Listings	320,649	314,369	312,003	312,170
White Page Errors	482	304	247	168
Percentage of White Page Errors	.150%	.097%	.079%	.054%
Classified Listings and Items of Advertising	126,101	129,569	131,582	134,193
Classified Errors	654	474	543	460
Percentage of Classified Errors	.519%	.366%	.413%	.343%
Total White Page and Classified Listings and Advertising	446,750	443,938	443,585	446,363
Total White Page and Classified Errors	1,136	778	790	628
Percentage of Errors	.254%	.175%	.178%	.141%

15. Shade, Faisst & Company is entitled to a credit allowance from PT&T in an amount equal to the basic main business exchange rate for a period of twelve months commencing September of 1972. No discrimination will result

*Includes 4th quarter of 1972.

from the payment of interest on reparations for that amount.

16. Shade, Faisst & Company filed an action in the superior court against PT&T seeking damages in connection with the aforesaid facts. PT&T takes the position in that litigation that there was no gross negligence involved and has refused to settle the case on a basis other than that of offering complainants a credit allowance.

The material issues in this proceeding are as follows: (1) Should the Commission enter an order changing the rules limiting the liability of telephone corporations? (2) Are complainants entitled to any relief because their firm was listed under the heading Accountants—Public rather than Accountants—Certified Public in the 1973 San Francisco directory? (3) Did PT&T discriminate against complainants by accepting listings and/or items of advertising from other persons after the applicable closing dates for the 1973 San Francisco directory? (4) Are PT&T's practices in connection with the acceptance and transmitting of new listings to its directory department unjust, unreasonable, unproper, inadequate, or insufficient? (5) Did PT&T act in an arbitrary, unjust, or improper manner when it declined to enter into a settlement of the superior court action with complainants on a basis other than that of a credit allowance?

Complainants first contend that the Commission should remove the rules limiting liability of telephone corporations so they can recover in the superior court action damages without limitation against PT&T for the error which is the subject of this complaint. In the *Limitation of Liability* case (1970) 71 CPUC 229, the Commission most recently considered the question of the limitation of liabilities of telephone corporations. After statewide hearings, we held that

there was no limitation of liability for tortious conduct, we ordered telephone corporations to adopt tariffs providing for liability in amounts not to exceed $10,000[2] for gross negligence, and we authorized them to adopt tariff provisions limiting liability for ordinary negligence to specified credit allowances. Complainants' arguments are similar to ones advanced in the *Limitation of Liabilities* case. Complainants presented no evidence on these issue which would impel us to change the rules dealing with the limitation of liability of telephone corporations.

Complainants next contend that PT&T acted arbitrarily and improperly by refusing to settle the superior court action filed against it by complainants. There is no merit in this contention. The record indicates that PT&T admits that an error occurred and has offered complainants 100 percent credit allowance for the year in question. PT&T denies that any gross negligence is present under the facts presented. Under the limitation of liability rules, heretofore discussed, gross negligence is a prerequisite for the maintenance of complainants' superior court action. Complainants argue that litigants often enter into compromise settlements of lawsuits, even though they believe in the correctness of their position, in order to minimize the cost of litigation. Complainants take the position that PT&T expends more money in defending lawsuits, such as their superior court action, than would be expended if they entered into compromise settlements. They ask the Commission to order PT&T to enter into good faith compromise settlements in such instances, which would benefit PT&T's ratepayers as well as the litigants.

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2. The decision limits liability for gross negligence to $2,000 for telephone corporations having gross revenues of $1,000,000 or less and $10,000 for telephone corporations having gross revenues over $1,000,000.

Complainants' contention that the net cost of settling all litigation would be less than the results of prosecuting it is entirely without factual support in this record. Furthermore, mandating such a policy could evoke the filing of numerous nuisance value actions which would inure to the disadvantage of PT&T's ratepayers. Even if it be assumed that the Commission has jurisdiction to enter the type of order contended for by complainants,[3] the facts in this proceeding do not call for the exercise thereof. Since a superior court action is pending between the parties, we believe it inappropriate to discuss in detail PT&T's refusal to settle that litigation on other than a credit allowance basis.[4] Our examination of the record leads us to find that PT&T did not act improperly, arbitrarily, or unreasonably

3. The Commission has ordered utilities subject to its jurisdiction to prosecute or defend matters cognate and germane to their utility activities. (*PG&E Co.*, etc. (1957) 56 CPUC 66, 67; *PG&E Co.* (1959) 57 CPUC 236, 248; *So. Cal. Gas Co.* (1959) 57 CPUC 250, 259; *So. Cal. Gas Co.* (1959) 57 CPUC 262, 270-71.) If a utility were to engage in a calculated course of unnecessary litigation, the Commission could disallow the expenses thereof in an appropriate rate proceeding. (*Pacific Tel. & Tel. Co. v. Public Utilities Commission* (1965) 62 C 2d 634, 659, 668-70.) We express no opinion on the question of whether the Commission could, consonant with due process, order a utility subject to its jurisdiction to compromise its claim or not assert a defense which it in good faith believes to be applicable in a superior court action involving a matter (e.g. awarding damages for gross negligence) over which the Commission has no jurisdiction. We are not here considering situations in which there have been prior Commission orders or factual determinations or in which the Commission has paramount jurisdiction. (*Pacific Tel. & Tel. Co. v. Superior Court* (1963) 60 C 2d 426, 430; *Miller v. Railroad Commission* (1937) 9 C 2d 190, 195, 197-98; *R. E. Tharp, Inc. v. Miller Hay Co.* (1968) 261 CA 2d 81; *People ex rel Public Utilities Commission v. Ryerson* (1966) 241 CA 2d 115; *Pratt v. Coast Trucking, Inc.* (1964) 228 CA 2d 139.)

4. In order to award a credit allowance (reparations) it is only necessary to determine that a mistake, error or omission, etc. occurred. (71 CPUC 229, 251 *et seq.*) The Commission does not award damages for gross negligence. (*Waters v. Pacific Telephone Company* (1974) 12 C 3d 1, 8-9.)

in refusing to settle the superior court action on a basis other than that of a credit allowance.

The remaining issue to be considered is whether PT&T discriminated against complainants. Public Utilities Code Section 453 provides in part:

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."

Complainants base their charge of discrimination on the fact that PT&T changed the lines of information listings for Harb, Levy, Weiland & Ring after June 8, 1972 but would not sell Shade, Faisst & Company lines of information after that date.

The Commission finds that no discrimination occurred under the facts herein presented. "Whenever a line must be drawn, there is little that separates the cases closest to it on either side." (*Wood v. Public Utilities Commission* (1971) 4 C 3d 288, 296; appeal dismissed for want of substantial federal question 404 U.S. 931.) Common sense indicates that if PT&T is to publish and distribute directories annually, deadlines must be established. The establishment of an earlier deadline for advertising (including informational listings) than for regular listings does not appear to be unreasonable. Since there is also a deadline for listings, the practice of changing advertising to conform to listings is also not unreasonable. There is a difference in making changes within directory advertising space already allocated and adding additional content requiring more space. As indicated, PT&T accepted an advertising order on April 3, 1972 for lines of information for the then

firm of Harb, Shade & Ring. This was before the June 8, 1972 cutoff date for acceptance of advertising. On June 26, 1972, the firm changed its main listing and asked that the lines of information reflect the new listing. No additional lines of information were added. The June 26th request was before the June 28, 1972 cutoff date. Under these facts, no discrimination occurred.

No other points require discussion. The Commission makes the following additional findings and conclusions.

Findings of Fact

17. There is no evidence in this record which would require the Commission to change the rules dealing with the liability of telephone corporations as set forth in the *Limitation of Liability* case 71 CPUC 229.

18. PT&T did not act improperly, arbitrarily, or unreasonably in refusing to settle the superior court action which complainants brought against it on a basis other than that of a credit allowance.

19. PT&T did not discriminate against complainants when it refused to accept advertising (lines of information) on June 21, 1972, for publication in PT&T's 1973 San Francisco directory.

Conclusions of Law

1. PT&T should be ordered to grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate for the period of one year commencing September 1972, with interest at the rate of 7 percent per annum from September 1973 to the payment or crediting thereof.

2. Complainants are entitled to no other relief in this proceeding.

ORDER

It Is Ordered that The Pacific Telephone and Telegraph Company shall grant Shade, Faisst & Company a credit allowance in an amount equal to the main business exchange rate charged Shade, Faisst & Company for the period of one year commencing September, 1972. The credit allowance shall bear interest at the rate of 7 percent per annum from September 1973 to the date of payment thereof (if paid in cash) or the date credited against accrued outstanding charges.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of April, 1975.

VERNON L. STURGEON
President
WILLIAM SYMONS, JR.
D. W. HOLMES
LEONARD ROSS
ROBERT BATINOVICH
Commissioners

Appendix B

Decision No. 84621

Before the Public Utilities Commission of the State of California

Case No. 9598
(Filed August 10, 1973;
Amended October 23, 1973)

Ross Shade and William H. Faisst, Shade, Faisst & Co., a partnership,
Complainants,

vs.

The Pacific Telephone and Telegraph Company,
Defendants.

ORDER DENYING RELIEF

On May 9, 1975, complainants, Ross Shade and William H. Faisst filed a "Petition for Reconsideration and to Amend Decision No. 84374". Attached to this filing is a document entitled "Petition Requesting the Public Utilities Commission to Withdraw Decision No. 84374 Forthwith".

We have considered fully the assertions and arguments presented and, except for the discussion immediately following, are of the opinion that good cause for relief has not been made to appear.

In Decision No. 84374 we specifically recognized that The Pacific Telephone and Telegraph Company's (PT&T) practices in connection with the acceptance and transmission of new listings to its directory department were a material issue. After reviewing the instant filing and the record herein, we are of the opinion that PT&T's practices in this regard are not unjust, unreasonable, improper, inadequate or insufficient.

PT&T's procedures were fully described at the hearings. Exhibit No. 14 is a flow chart which shows the carefully drawn steps developed to handle new listings. A minor change did occur in new listing procedures between 1972 and the present. However, we are unable to find fault with either the past or present procedures.

In the instant filing, petitioners specifically refer to (1) information given them regarding cut-off dates for listings and (2) the preparation and use of "contract memoranda" and "listing agreement forms" by PT&T. We cannot, based on the record established, find that these matters evidence a shortcoming in PT&T's procedures.

Therefore, It Is Ordered that:

1. Decision No. 84374 is hereby modified by the inclusion therein of the following findings of fact:

> "20. PT&T's practices in connection with the acceptance and transmitting of new listings in its directory department have not been shown to be unjust, unreasonable, improper, inadequate or insufficient."

2. Further relief with respect to Decision No. 84374, as modified hereinabove, is hereby denied.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 1st day of July 1975.

D. W. Holmes
President
William Symons, Jr.
Vernon L. Sturegon
Robert Batinovich
Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75 - 1163

ROSS SHADE, Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

On Appeal From The Supreme Court of The State of California

PETITION FOR REHEARING

ROSS SHADE, For himself,
44 Montgomery St. #2930
San Francisco, California
94104
415-956-7230

TABLE OF CITATIONS

In The

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75 - 1163

ROSS SHADE, Appellant

vs.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA

On Appeal From The Supreme Court Of
The State Of California

PETITION FOR REHEARING

In this petition the appellant seeks reconsideration of this court's order dated April 19, 1976 which order dismissed his appeal for want of jurisdiction.

The appellant respectfully requests the court to reconsider and to hear arguments concerning tariff regulations and the procedures related to due process applicable to his case. After suffering financial loss, it is difficult for the appellant to pursue a crusade to correct what he knows is unjust. His jurisdictional statement was necessarily brief in order to reduce the cost of printing. It is hoped that what follows will clarify the arguments and facts that might have contributed to the initial decision of this court to dismiss his appeal.

This case concerns the right to recover the damages caused by the negligence of another. This right is important and is considered by many to be the basis for non-violent behavior in keeping with a civilized society. Any limitation on the rights of citizens to obtain justice should not be tolerated.

The appellant believes that the Public Utilities Commission of the State of California has failed to recognize that the rules which limit the amount of damages which the appellant may recover, are repugnant to the equal protection of the law provisions of the Constitution of the United States. He also believes that this limitation violates the Public Utilities Code of the State of California but was denied the opportunity to prove this in a court of law.

In those states where tariffs prevent recovery of damages from telephone companies, a substantial portion of the business community are being denied a right which is guaranteed by the Constitution of the United States. And, because the yellow pages have become one of the most important sources of business, the damages that occur each year are very large. The appellant asks why he and all the others that are damaged, should bear the loss so

that the telephone companies can maintain their rates and profits at their present level?

The actions of the Public Utilities Commission of the State of California can not be questioned, reversed or corrected by any court other than the California Supreme Court. (Section 1759 of the California Public Utilities Code) Of course, while proceedings are pending before the Commission, there is always the expectation that due process will be observed.

The California Public Utilities Commission is composed of individuals none of whom have legal experience. It is unreasonable to expect, under these circumstances, that due process will be observed in all instances. The Commission as formulated, is not qualified to deal with the constitutional questions. Without the right to be heard in an appeal before a qualified court complaintants really have no guarantee that their proceedings before the Commission will not be a sham.

There was never any question that the Pacific Telephone Company was negligent in their omission from the yellow pages of the professional listing for the appellant's firm. The order of the Commission was that, because of this negligence, the Pacific Telephone Company was to allow a credit against the telephone charges, which reduced the amount that the appellant had to pay for service by no more than six hundred dollars. The Commission has repeatedly held that it has no authority to award damages (W. Schumacher v P.T.&T. Co., Decision No. 69025, 64 Cal. P.U.C. 295; M. W. McDaniel v P.R.&T. Co., Decision No. 69568, 64 Cal. P.U.C. 707) but have prohibited the courts from determining and awarding damages in the case of ordinary negligence and have limited the amount in the case of gross negligence. (Rule 14 "Limitation

of Liability - page 3 of Jurisdictional Statement.

In the case of Product Research Associates v Pacific Telephone Company, (16 C.A. 3d 651) in April 1971, the Court of Appeal in California held that the rule of which the appellant complains, (limitation of damages) did not prevent the courts from awarding damages. In 1973 that court again held that the Commission's rules did not prohibit the awarding of damages. (Waters v. Pacific Telephone, 16 C.A. 3d 651) When the appellant filed his complaint with the Public Utilities Commission in 1973, this was then the statis of the law in California. However, without considering the constitutional issues the Supreme Court of the State of California, over-ruled the lower court on July 9, 1974. (Waters v. Pacific Telephone Co., 12 C 3d 1) Even through the appellant's hearing before an employee of the Commission was in December 1973 and final briefs had been filed in February 1974, the case was still pending at July 9, 1974. The case was also still pending on September 12, 1974 when the appellant petitioned the Commission to consider the new circumstances brought about by the decision in the Waters case. Even through the appellant does not agree with the contention of the attorney for the telephone company to the effect that the Commission is a "court", he asked the Commission to consider the question because he has a civil action pending and under the new circumstances might be denied his right to recover damages in that action. The first real opportunity to raise the constitutional issues was the Supreme Court of the State of California and that court denied him a hearing.

The grant of jurisdiction contained in Article III of the Constitution is sufficiently broad to insure that no policies of major moment need be excluded from this Court's inspection. The question of limitation of damages is important to all

persons who depend on the business obtained from their listing in the yellow pages of the telephone directory. This Court has ruled on the question of limited damages before - but never in any case where that limitation was unreasonable, (i.e. when the appellant had an alternative such as to allow him to insure against possible damages) nor in any case where the damage was the result of gross negligence.

The standing to raise the federal question is also dependent upon state rules, but only if the state rules in this respect are reasonable and subject always to the ultimate and independent judgment of the Supreme Court of the United States. (Cramp v Board of Public Instruction, 368 U.S. 278) The appellant, having a case pending in the Superior Court of the State of California did ask the Public Utilities Commission in a timely mannor, to consider the constitutional issue concerning limitation of damages. This request was denied. It was not reasonable to refuse to hear this argument when prior to that time the courts had not inforced the limitation of damages rule, and when the appellant had in fact questioned the reasonableness of that rule on other grounds.

The telephone companies in California nor elsewhere should not be above the law; they should not have superior rights to persons. There is no good reason why they should not be subject to a suit if, by reason of their negligence a person is damaged. Such a position is reserved for the sovereign in some countries. However, in the United States even the government has not retained such a position. Where-as, some limitation do damages was provided for: (1) Hospitals rendering free services (Silva v Providence Hospital 14 Cal 2d 762) (2) Local governmental agencies (Muskopf v Corning Hospital Dist. 55 Cal 2d 211 and Harrey v Clyde Park Dist. 32 Ill 2d 60) and (3) Drivers having

guests in their auto who are injured during an accident (Brown v Merlo, 106 Cal Rpter 388; 506 P 2d 212) - in all of the above instances the courts have ruled on constitutional grounds that the limitation was not reasonable.

CONCLUSION

This Court's decision concerning the appellent's petition for rehearing is of course of vital importance to him. It is also of importance to all those others who have been or will be damaged. The fact that the California Public Utilities Commission, by mere regulation, can purport to limit liability for negligence inflicted by a utility upon a subscriber to the negligible amounts provided, should shock the conscience of the Court. And, if for some reason, the Court can not see its way clearly to rule on the constitutional question concerning limitation of damages, the appellant pleads that the court find that due process has not been observed so that he may at last have his day before a true court of law.

CERTIFICATE OF GOOD FAITH

This petition is submitted in good faith and not for the purpose of delay.

Respectfully submitted,

s/s
Ross Shade

AFFIDIVIT OF SERVICE

I hereby certify that I have this date served the foregoing petition for rehearing upon all interested parties in this proceeding as shown below, addressed to each and including three copies, sent by first class mail, postage prepaid.

Signed under penalty of perjury this first day of May, 1976 at San Francisco, California.

Richard D. Gravelle, J. Calvin Simpson
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